No. 99-1594 (2)

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

JAMES T. BUTTS, RAY COOPER, SHANE TALBOT, RAYMOND BENNETT, AND MICHAEL CROSBY

Petitioners,

v.

JAMES McNALLY AND JAMES JOHNSON BEY

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations is a non-profit organization, representing state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that serves to advance the interests of law enforcement officers through advocacy, education and legislation. NAPO represents 4,000 organizations, with more than 220,000 sworn law enforcement officers and 11,000 retired officers. Within the Ninth Circuit, NAPO represents through its members tens of thousands of officers in Alaska, Arizona, California, Montana, Nevada, Oregon, and Washington, including the five Petitioners.

Therefore, the associations and officers represented by NAPO and its 501(c) affiliate, the National Law Enforcement Officers' Rights Center, have a direct and immediate interest in the resolution of any issue which simultaneously affects both the ability of law enforcement officers to investigate crimes, and their potential civil liability for doing so in particular ways. This case presents such an issue.*

SUMMARY OF ARGUMENT

Confusing *admissibility* with *permissibility*, the Ninth

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*No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. The Respondents and the Petitioners have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

Circuit Court of Appeals has wrongly held, in conflict with every other federal Circuit which has addressed the issue, that because interrogation techniques used by officers rendered criminal defendants' statements inadmissible in their trials, the officers *ipso facto* violated the Fifth Amendment *trial* privilege *during interrogation,* making them subject to civil liability under 42 U.S.C. §1983. *California Attorneys for Criminal Justice v. Butts,* 195 F.3d 1039 (9th Cir. 1999).

This holding (1) mistakes the evidentiary prophylaxis of *Miranda v. Arizona,* 386 U.S. 484 (1966) for the Fifth Amendment's privilege against compulsory self-incrimination, (2) wrongly imports principles of Fourteenth Amendment due process into Fifth Amendment analysis, and (3) leaves officers throughout the Ninth Circuit exposed to unwarranted liability for interrogation practices that do not violate this Court's interpretations of constitutional standards.

ARGUMENT

Can a killer get away with murder by committing perjury during trial while the judge and the prosecutor are forced to sit silently by, and then sue the police officers for having questioned him in such a way as to have deprived the prosecutor of the use of his confession to prove the murder or to impeach the perjury? Astonishingly, the Ninth Circuit's

opinion in this case answered that question in the affirmative.

Respondent James McNally told police that he lay in wait with a kitchen knife at the ready and then stabbed his victim to death. Under California law, this is a capital murder. Calif. Pen. C. §190.2(a)(15). But McNally's statement was made in response to police questioning after a *Miranda* invocation, and so it was inadmissible at trial to prove guilt.

Further, because the officers had made representations that the statement could not be used in court and had denigrated the role of counsel, the statement was ruled inadmissible even for impeachment, under the Fourteenth Amendment's due process clause "voluntariness" cases.

Under the cover of judicially-created exclusionary rules, McNally testified under oath at his jury trial to a substantially different account of the killing. As a result, he was convicted only of the lesser charge of manslaughter. He has now sued the police officers under 42 U.S.C. §1983 for a violation of his Fifth Amendment privilege against being compelled to be a witness against himself—even though his statements were *never* introduced at his trial, and even though the officers' missteps caused him *no* damages, but in fact inured to his benefit by allowing him to escape a murder conviction and penalty via the expedient of incontestable perjury.

In the other case, Respondent James Bey was convicted of murder, the state appellate court finding harmless error in the impeachment use of his post-invocation statement, which was ruled involuntary because of similar police assurances it would not be used in court. *People v. Bey,* 21 Cal.App.4th 1623 (1993). Bey also sued the police under §1983 for a claimed Fifth Amendment violation.

In the combined cases, the Ninth Circuit affirmed a denial of qualified immunity for the petitioning officers, notwithstanding that clearly established law recognized that decisions of this Court have given officers an incentive to continue questioning after a *Miranda* invocation. *Oregon v. Hass,* 420 U.S. 714, 723 (1975).

I. The Ninth Circuit's decision that police officers may be liable under §1983 for questioning a suspect who has invoked *Miranda*'s protection is irreconcilable with the consistent line of cases from this Court clarifying that *Miranda* is a court-created, non-constitutional, evidentiary prophylaxis designed to prevent Fifth Amendment violations at trial, and that the privilege protected by *Miranda* is not violated by questioning or even by compulsion, but by erroneous admission of compelled testimonial self-incrimination.

In conflict with every Circuit to have considered the question (*see* Pet. Br. at 23), the Ninth Circuit has twice ruled (in *Cooper v. Dupnik,* 963 F.2d 1220 (9th Cir. 1992), and in this

case—*Cooper's* spawn), that police questioning not comporting with *Miranda*'s courtroom admissibility requirements constitutes an accomplished violation of the Fifth Amendment in the police station that is actionable under §1983. In both cases, the Ninth Circuit has failed to observe the critical distinction between police procedures that merely render resulting evidence constitutionally inadmissible in a criminal trial, and those procedures that work a constitutional violation at the moment police employ them, without regard to whether evidence is obtained or admitted at trial.

Both in *Cooper* and in the present case, the Ninth Circuit's analysis mistakenly assumed that police conduct that rendered evidence inadmissible at trial was *itself* constitutionally impermissible. Comparison of the categories of exclusionary rules and their objectives shows this assumption to be unsound. That an officer's noncompliance with *Miranda*'s prophylactic procedures may render a statement inadmissible in the prosecution case in chief does *not* mean that the officer has violated the Fifth Amendment, so as to be liable in civil damages. Indeed, the defendant who benefits by application of this exclusionary rule has not been "damaged" at all—only the police, the prosecution and society are left in a worse condition when highly probative evidence of a

defendant's guilt may not be disclosed to the jury.

A number of judicial exclusionary rules have been erected to prevent the introduction of evidence where a core constitutional right would be violated or impermissibly burdened *if the evidence were used for an improper purpose at trial.* For example, a defendant's Sixth Amendment trial right of confrontation would be violated by the introduction in a joint trial of a non-testifying codefendant's confession implicating both. *Bruton v. United States,* 391 U.S. 123 (1968). But that situation does not mean that the interrogating officer has violated the Sixth Amendment by asking the questions that produced the inadmissible statement.

Similarly, introduction at trial of a suggestive pretrial identification might violate procedural due process. *Stovall v. Denno,* 388 U.S. 293 (1967). But the officer who conducted the identification procedure did not violate the U.S. Constitution merely by doing so in such a manner as to render the identification inadmissible. Civil liability under §1983 could not be predicated on *inadmissibility* under *Bruton* or *Stovall. E.g., Hutsell v. Sayre,* 5 F.3d 996, 1005 (6th Cir. 1993) (no police liability for conducting an inadmissible identification procedure).

By contrast, other exclusionary rules function not to

prevent violations at trial, but *to deter official misconduct* that works an accomplished constitutional violation when committed. For example, no evidentiary interest protected by the U.S. Constitution is abridged by the introduction of evidence seized in violation of the Fourth Amendment. But this Court has ruled that evidentiary exclusion of the fruits of such violations is necessary to deter repetition of the constitutional error *already committed* by the police. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Likewise, where substantive due process has been breached by egregious official behavior that "shocks the conscience," resulting evidence is excluded in order to deter disrespect for the standards of decency embodied in the concept of due process. *Rochin v. California,* 342 U.S. 165 (1952). In such cases, potential §1983 liability *does* arise, because exclusion of evidence is contingent upon an accomplished police violation of constitutional rights.

Into which category does the *Miranda* exclusionary rule fit? Is it, like *Mapp* and *Rochin,* intended to deter future violations of the Constitution of a kind *already committed* by police conduct? Or is it, like *Bruton* and *Stovall,* intended to *prevent* a violation *at trial*? Is Miranda's objective to *mold police conduct*, or to *prevent the admission of evidence* that might violate the Fifth Amendment trial privilege against

compelled self-incrimination? In other words, is *Miranda remedial,* or is it *prophylactic?*

This Court has answered these questions repeatedly, clearly and consistently, as follows: "The constitutional issue we decide...is the *admissibility* of statements obtained from a defendant questioned while in custody." *Miranda v. Arizona, supra,* 384 U.S. at 445 (emphasis added). The "narrow issue" decided by *Miranda* was "admissibility of statements." *Beckwith v. United States,* 425 U.S. 341, 345 (1976). "[*Miranda*'s] objective is not to mold police conduct for its own sake." *Moran v. Burbine,* 475 U.S. 412, 425 (1986). Interrogation without *Miranda* compliance does not abridge the Fifth Amendment privilege, but simply "depart[s] from the prophylactic standards" of that decision. *Michigan v. Tucker,* 417 U.S. 433, 446 (1974). "The Court made it clear that the basis for decision was the need to protect the fairness of the trial itself...." *Schneckloth v. Bustamonte,* 412 U.S. 218, 240 (1973). "*Miranda* safeguards 'a fundamental trial right'." *Withrow v. Williams,* 507 U.S. 680, 692 (1993).

Since "*Miranda*'s preventive medicine" is available to a person "who has suffered no identifiable constitutional harm," *Oregon v. Elstad,* 470 U.S. 298, 307 (1985), it is evident that the *Miranda* exclusionary rule is designed to prevent Fifth

Amendment violations *at trial,* rather than to remedy constitutional violations already committed by police. In reversing the Ninth Circuit in an earlier case, this Court made the distinction plain: The privilege against self-incrimination "is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials may ultimately impair that right, *a constitutional violation occurs only at trial.*" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added).

In *United States v. Balsys,* 524 U.S. 666 (1998), the Court rejected the notion that the Fifth Amendment provides a "protection of personal inviolability" prohibiting involuntary interrogation, without regard to whether testimonial responses could or would be used in a criminal prosecution. This ruling in *Balsys* is consistent with the Court's teachings that the Fifth Amendment is not violated by the *compulsion* of statements, but by the *use* of compelled statements in a criminal prosecution. *Lefkowitz v. Turley,* 414 U.S. 70, 78, 84 (1973); *Kastigar v. United States,* 406 U.S. 441, 453 (1972); *Garner v. Broderick,* 392 U.S. 273, 276 (1968).

Balsys is also consistent with the quoted passage from *Verdugo-Urquidez, supra,* that a violation of the Fifth Amendment can only occur *at trial,* when a compelled

statement is wrongfully introduced. Although *Miranda* holds that a person undergoing custodial interrogation may claim the protection of the Fifth Amendment in refusing to talk to police—and once that right is invoked, subsequent statements will be inadmissible at trial to prove guilt—nothing in *Miranda* or any of this Court's other decisions applying the Fifth Amendment privilege against compelled self-incrimination suggests that continued *questioning* violates the Fifth Amendment. This must be, since the *Miranda* procedures "were not themselves rights protected by the Constitution." *Michigan v. Tucker, supra,* 417 U.S. at 444.

II. The Ninth Circuit's reliance on inadmissibility of Respondents' statements under *procedural* due process is misplaced, because Petitioners' conduct was not "shocking to the conscience," in violation of *substantive* due process, and also because inadmissibility under the Fourteenth Amendment due process standards is irrelevant to Respondents' asserted Fifth Amendment cause of action.

Compounding its error in looking to *Miranda* evidentiary decisions to assess police liability for constitutional violations, the Ninth Circuit also relied upon evidentiary principles from due process clause cases to bolster its opinion that officers could be civilly liable when their interrogation renders statements inadmissible. This is the same analytical mistake, applied to a different body of decisional law.

Miranda's concern was protection of the Fifth Amendment trial privilege against introduction of presumptively-compelled statements resulting from the inherently compelling atmosphere of custodial interrogation. *Miranda* is not a substitute for the due process voluntariness inquiry that focuses on the presence or absence of actual police coercion by such tactics as force, threats or overbearing promises of leniency. *Miller v. Fenton*, 474 U.S. 104, 110 (1985); *Oregon v. Elstad, supra,* 470 U.S. at 307-08. Even though a statement obtained by police-initiated questioning after a *Miranda* invocation is admissible for impeachment, *Oregon v. Hass, supra,* 420 U.S. at 723, an involuntary statement obtained by actual police coercion is not. *Mincey v. Arizona,* 437 U.S. 385, 398 (1978). These were the principles applied by the California courts in Respondents' criminal trials and appeals.

But as discussed above, admissibility determinations are not necessarily conclusive of whether constitutional rights were violated by particular police conduct. In the Fourteenth Amendment inquiry in state cases, as in the Fifth Amendment due process inquiry in federal cases, it is important to distinguish between *substantive* and *procedural* due process. *Daniels v. Williams,* 474 U.S. 327, 337-38 (1986) (Stevens, J.,

concurring).

Substantive due process protects against arbitrary government actions. A violation of substantive due process "is complete when the wrongful action is taken." *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). Police interrogation violates substantive due process when techniques are employed that "shock the conscience." *Cf., County of Sacramento v. Lewis,* 523 U.S. 833 (1998). If, for example, police used force or other egregious measures to coerce a statement, their constitutional violation would be complete and actionable, and any resulting statement would be inadmissible at the declarant's criminal trial, for any purpose. *E.g., Beecher v. Alabama,* 389 U.S. 35, 38 (1967) (suspect ordered at gunpoint to confess or be killed, while officer fired rifle next to suspect's ear).

Procedural due process seeks to guarantee fairness of the methods used by the state to deprive a person of life, liberty or property. Even though police interrogation might not be so offensive as to shock the conscience, it might still be sufficiently coercive (mild threats and promises of leniency, for example) as to render a statement involuntary, and so inadmissible at trial under procedural due process. *Arizona v. Fulminante,* 499 U.S. 279, 287 (1991) (credible threat by police agent made confession involuntary).

Police assurances to a suspect under interrogation that his statements will not be used against him in court may arguably be sufficiently coercive as to make a statement inadmissibly involuntary. The fundamental fairness implicit in procedural due process might preclude evidentiary *use* of statements induced by such promises. *Cf., Doyle v. Ohio,* 426 U.S. 610, 618-19 (1976) (due process is violated if silence induced by *Miranda* assurances is used at trial for impeachment). But such assurances are not shocking to the conscience and do not violate the U.S. Constitution.

Therefore, even in a §1983 liability analysis for a *Fourteenth* Amendment violation, it would be error to base potential liability on the fact that police used inducements that made statements inadmissible under *procedural* due process, where the inducements were not so extreme as to shock the conscience and hence violate *substantive* due process.

The Ninth Circuit's opinion, however, commits error upon error, first relying upon the *inadmissibility* of respondents' statements under procedural due process (which does not imply a police violation of the Constitution), and then importing this *Fourteenth* Amendment admissibility law into the analysis of whether police questioning violated the *Fifth* Amendment rights of respondents. The result is an invalid conclusion.

Police practices that cause inadmissibility under the Fourteenth Amendment (without themselves violating that Amendment when employed), combined with police practices that cause inadmissibility under the Fifth Amendment (without themselves violating that Amendment when employed), cannot be added together to create an accomplished violation of the Fifth Amendment. The Ninth Circuit's decision is both logically and legally unsupportable. And it is precarious.

III. If allowed to stand, the Ninth Circuit's decision will have a serious impact on law enforcement, as officers become apprehensive about questioning criminal suspects.

It is not difficult to imagine the chilling effect this decision will have on law enforcement officers throughout the states comprising the Ninth Circuit's geographical jurisdiction. Officers now recognize that their investigative efforts later found by courts to have resulted in inadmissible evidence—whether under *Miranda* or procedural due process—can furnish the basis of civil liability, even though the actions themselves violated no provision of the Constitution. Therefore, officers will be understandably reluctant to risk their personal assets by engaging in interrogation at all.

Police will not always be able to predict, for example, whether their words or conduct will be considered a threat or promise that causes a statement to be involuntary. And the

many confusing and misunderstood *Miranda* concepts (custody, interrogation, warning, waiver, invocation, reinitiation, and safety exception) remain so unpredictable in many situations that, "In many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained." *Oregon v. Elstad, supra,* 470 U.S. at 316.

Where interrogation of a suspected murderer or other offender is subject to such interpretive uncertainty, the added risk of §1983 liability can have only one effect on the police officer, and that is "to make him less willing to do his duty." *United States v. Leon,* 468 U.S. 897, 920 (1984) (citation omitted). The costs to public safety of investigative reticence will be paid not merely by the loss of evidence and harm to criminal justice, but by the loss of innocent life. *Cf., People v. Krom*, 461 N.E.2d 276, 278-79 (N.Y. 1984) (when a kidnaping suspect asked for counsel, officers stopped all questioning; meanwhile, his victim suffocated in a coffin-like box).

CONCLUSION

It seems doubtful that when the §1983 remedy was provided by the Ku Klux Act of 1871, the Congress could ever have foreseen that a United States Court of Appeals would someday extend availability of this remedy to convicted killers,

whose criminal prosecutions had been deprived of the most probative and damaging evidence of their guilt, all because police continued to seek the truth from them while acknowledging that their assertion of rights would make their statements inadmissible against them.

This decision of the Ninth Circuit is simply wrong. It conflicts with principles enunciated by this Court, as well as the rulings of four other Circuits. Its potential consequences for law enforcement and public safety are unacceptable and unwarranted. Certiorari should be granted, and this decision should be reversed.

Respectfully submitted on May 3, 2000,

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